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No. 9506

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ILENE WARREN, etc.,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

REPLY BRIEF OF APPELLANT.

On Appeal from the Supreme Court of the Territory of Hawaii.

CHARLES B. DWIGHT,
Attorney for Ilene Warren, etc.,
Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTIONAL POINT.

PETITION FOR REHEARING HAVING BEEN SEASONABLY FILED AND CONSIDERED BY THE COURT, THE TIME WITHIN WHICH THE APPEAL MUST BE TAKEN COMMENCES TO RUN FROM THE DATE OF THE DECISION ON THE PETITION.

The Appellee in its brief raises a jurisdictional point and contends that the appeal should be dismissed for lack of jurisdiction upon the ground that the appeal herein was not duly made within three months after the entry of the judgment appealed from. It also contends that because the Supreme Court of Hawaii was without jurisdiction to consider the petition for rehearing, the filing of the petition, followed by a decision of the Supreme Court of

Hawaii thereon, did not extend the time allowed to appeal.

It is the respectful contention of Appellant that the filing of the petition for rehearing, within the time required by the rule and the consideration thereof by the Supreme Court as shown by its decision denying the motion, suspends the running of the time for taking an appeal, and that the time within which proceedings to review must be initiated begins from the date of the denial of the petition.

The rules of the Supreme Court of Hawaii, applicable to this issue are as follows:

> Rule 10. MANDATE:
>
> "1.—Whenever appropriate upon the determination of a matter in this Court a notice or mandate shall be issued to the Court below informing the Court of the proceedings in that Court as to Law and justice may appertain. The notice or mandate may issue at any time on the order of the Court or a Justice thereof, but unless otherwise ordered by the Court or a Justice thereof, it shall issue as of course after ten days from the rendition of judgment.
>
> 2.—In criminal cases the clerk shall forthwith issue the mandate upon the form being approved by one of the Justices."

> Rule 5 provides—
>
> "A petition for rehearing may be presented only within twenty days after the filing of the opinion or the rendition of judgment unless by special leave additional time is granted during such twenty days by the court or a justice thereof; and shall briefly and distinctly state its grounds,

and be supported by certificate of counsel; and will not be permitted to be argued unless a justice who concurred in the opinion or judgment desires it. If the case has been remitted to the lower court it may be recalled."

The Appellant respectfully contends that the petition for rehearing was in proper form and seasonably filed and was entertained by the Supreme Court; that the time for filing the appeal herein commenced to run from the disposition of the petition on November 25, 1939 (Rec. 669-71), and that therefore the appeal herein was taken in time.

It is conceded by Appellee that the petition for rehearing was in proper form and filed in time. It is contended, however, by Appellee that the Supreme Court was without jurisdiction to grant or deny the petition and that the decision denying the petition could not be construed as being an entertainment of the petition by the Court.

The Supreme Court, in its decision on the petition for rehearing said:

> "The foregoing is not to be considered as any limitation upon, or restriction of, the inherent power of this court of its own motion seasonably made to take all necessary steps to correct its opinions and judgments. Although without jurisdiction to pass upon the merits of the motion for rehearing, *we have carefully examined it* and entertain no doubt that were it properly before us for consideration we would be compelled to deny the petition for lack of merit.
>
> Petition dismissed."
>
> (Record pages 670-671.)

Clearly the Court entertained the Petition and that is all that is necessary to enlarge the time to appeal.

"Petition for rehearing though defective, but not mere sham, where petitioner acts in good faith will toll limitation for taking appeal."

Thos. Day Co. v. Doble Laboratories, 41 Fed. (2) 51;

Larkin Packer Co. v. Hendesleter Tool Co., 60 Fed. (2) 491.

"When a motion for a new trial, in a Court at Law or a petition for rehearing in a Court of equity is duly and seasonably filed, it suspends the running of the time for taking a writ of error or an appeal, and the time within which the proceedings to review must be initiated begins from the date of the denial of the motion."

Morse v. U. S., 70 Law. Ed. 518.

"The filing of a motion for a new trial within the judgment term, is effective to carry the judgment over, for writ of error purposes, beyond the term, if the motion is at any time, during the term or thereafter considered—'entertained' by the trial Court."

Payne v. Garth, 285 Fed. 301, 309.

In *Day Co. v. Doble Laboratories,* supra, this Court said,

"Petition for rehearing although not filed in time held effective to toll limitation for taking appeal."

41 Fed. (2) 51.

The authorities cited by Appellee do not support its contentions.

The case of *Browder v. McArthur,* 7 Wheat. 58, 5 L. Ed. 397, was a case wherein the Supreme Court denied a petition for rehearing of a case determined at the prior term and remitted to the lower Court. The Supreme Court simply adopted the practice then prevailing before the Courts of Kings Bench and of Chancery in England, which was the practice adopted by the Supreme Court from its inception and finally incorporated in rule 30 of the rules of January 7, 1884, 108 U. S.

It is elementary that under the common law, a Court cannot modify its judgments after the expiration of the term in which the judgment was rendered.

The case of *Peck v. Sanderson,* 18 How. 42, 15 L. Ed. 262, is to the same effect as the *Browder* case, supra. This case was decided at a prior term, and a motion was made to re-argue. The Court denied the motion because it was filed too late.

The case of *Texas Pac. Ry. Co. v. Murphy,* 111 U. S. 488, 28 L. Ed. 492, cited by appellee, really supports the position of appellant, for it held,

> "If a petition for rehearing is presented in season and entertained by the Court, the time limited for an appeal or writ of error does not begin to run until the petition is disposed of."

The case of *The Aspen Mining and Smelting Co. v. Billings*, 150 U. S. 31, 37 L. Ed. 986, is to the same effect as the case of *Texas Pacific Railway Company v. Murphy,* for the decision is the same which is,

> "If a motion or a petition for rehearing is made or presented in season and entertained by the Court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of."

It is further respectfully submitted that the appeal was taken within the time required by law as the petition for re-hearing was seasonably filed and entertained by the Court and the decision on the petition for re-hearing was entered on November 25, 1939 and that three months had not expired from that date when the appeal was taken.

ARGUMENT.

POINT I.

As to Assignments of Error No. III, the Appellee contends that where a police officer is invited into a house of prostitution, apparently open to any prospective customer, at the request of the person in control who does not know he is a police officer, the police officer may testify as to what he sees or hears therein.

The weakness of the contention is borne out by the fact that not one of the police officers in the raiding squad, knew as a fact, that the defendant's home was a house of prostitution. They simply visited the defendant's home to raid it, in the hope that some evidence of prostitution might be unearthed. In so far as any direct knowledge on the part of Burns that Appellant's home was a house of prosti-

tution is concerned, he had absolutely no such knowledge.

The fact that there was evidence in the case that Appellant did operate a house of prostitution, does not prove that the officers had such knowledge, but on the contrary, the evidence shows that they had no such knowledge.

POINT II.

ASSIGNMENTS OF ERROR IV, V AND VI.

The Appellee contends that the evidence of the witnesses Rodgers, Kiehm and Penland was competent because it was obtained from a source independent of the illegal search and seizure.

The testimony of these witnesses both on cross and by direct examination, as more fully set forth in the opening brief conclusively shows that the police first obtained the information of the existence of the equipment through the illegal seizure and used that information to extract the evidence regarding the equipment from the witnesses.

The fact that the police had knowledge of the equipment prior to ruling of the trial Court suppressing the same is immaterial. The fact that the witnesses were present in the house when the death occurred and had knowledge of the equipment at the time does not make their testimony competent.

It is reiterated that the Government had no knowledge of the existence of the equipment until the illegal seizure was made.

POINT III.

ASSIGNMENTS OF ERROR VII, VIII, IX, X AND XI.

The Appellee contends that because the Supreme Court of Hawaii said the constitutional question should not have been injected into the case, this Court should not pass upon the question.

The fact is that the Appellant's Constitutional rights were directly affected by the instructions. The instructions were given over objection and were erroneous and that therefore, the Court committed reversible error.

However, Appellee contends that Section 5404 of the Revised Laws is constitutional because there is no prohibition in the Fourth Amendment against an arrest without a warrant or an arrest on reasonable suspicion but only that the prohibition is against unreasonable searches and seizure.

The Appellant does not dispute that contention but does submit that any arrest not made in accordance with the Amendment is unreasonable and prohibited by the Amendment.

A statute which permits arrests in cases of misdemeanors where the offense is not committed in the presence of the arresting officer permits unreasonable arrests which are prohibited by the Amendment, and Section 5404 R. L. Hawaii, 1935, comes clearly within that class of statute.

CONCLUSION.

It is therefore respectfully submitted that the contentions of Appellee are without merit and that the Judgment appealed from should be reversed.

Dated at Honolulu, T. H. this 12th day of October, A. D. 1940.

Respectfully submitted,

CHARLES B. DWIGHT,

Attorney for Ilene Warren, etc., Appellant.